

IN THE MATTER OF ARBITRATION BETWEEN	}	
	}	
COUNCIL 65 OF THE AMERICAN	}	DECISION AND AWARD
FEDERATION OF STATE, COUNTY	}	
AND MUNICIPAL EMPLOYEES	}	OF
AFL-CIO	}	
	}	ARBITRATOR
THE EMPLOYER OR COUNCIL	}	
	}	
and	}	
	}	
MINNESOTA INDEPENDENT	}	BMS Case: 05-PA-997
FIELD STAFF AND CLERICAL	}	
ASSOCIATION	}	
	}	
THE UNION	}	

ARBITRATOR: Eugene C. Jensen

DATES AND LOCATIONS OF HEARING: September 23, 2005
Grand Rapids Public Library

October 10, 2005
January 23, 24, & 25, 2006
February 20 & 21, 2006
Sawmill Inn, Grand Rapids

DATE OF FINAL SUBMISSIONS April 24, 2006

DATE OF AWARD: May 1, 2006

ADVOCATES

For the Employer: Gregg Corwin
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For The Union: Don Bye
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GRIEVANT

David Mortenson

ISSUE

The parties agreed on the issue: Did the Employer have just cause to discharge David Mortenson, hereinafter referred to as the Grievant? And if not, what shall be the remedy?

JOINT EXHIBITS

1. The January 1, 2003, through December 31, 2005 Labor Agreement between the Employer and the Union.
2. The Employer's Policy Handbook, dated January 1, 2003.
3. The Employer's job description for Field Service Representative, dated April 19, 2001.
4. January 24, 2005, three day suspension letter which was given to the Grievant.
5. February 14, 2005, grievance filed by the Union in response to the above-mentioned three day suspension.
6. February 16, 2005, Employer's letter sent to the Grievant outlining the actual days of the three day suspension.
7. Agreement between the parties regarding the three day suspension; written by the Arbitrator and dated October 11, 2005.

BACKGROUND

This Arbitrator was originally contacted to hear a case involving a three day suspension of the Grievant. That hearing took place on September 23, 2005, and October 10, 2005. Halfway through the second day of testimony, the parties agreed to settle the three day suspension, and they asked the Arbitrator to prepare an award that captured the essence of their agreement:

NOTE: The document was prepared by the Arbitrator and dated October 11, 2005. The Arbitrator has labeled this document Joint Exhibit 7.

Joint Exhibit 7:

On October 10, 2005, the Parties agreed to resolve the above-mentioned grievance [three day suspension] in the following manner: The Employer will withdraw the three day suspension that it gave the Grievant on January 24, 2005. The Employer and the Union agree that any or all of the Employer's evidence offered at the above-mentioned hearing [September 23, 2005, and October 10, 2005] shall be admissible in any future grievance and/or arbitration hearing(s) related to the Grievant's subsequent discharge by the Employer.

Later, the Arbitrator was contacted by the parties to hear the subsequent discharge case.

The dispute that gives rise to this arbitration stems from the Employer's discharge letter to the Grievant, dated June 3, 2005 (Employer Exhibit 74):

1. You have admitted to possessing an illegal substance, which has negatively affected the reputation of Council 65 and violates AFSCME Council 65 Policy 1.04 (Business Ethics and Conduct)
2. Falsifying statements of expenses which include your time and expense sheet. This also violates Policy 1.04. In addition you have continued to submit late time sheets.
3. Unauthorized use of Council 65 credit card for personal gas purchases, in violation of Policy 1.04 and the collective bargaining agreement Article 5, Section I (1).
4. Unauthorized use of union funds for personal expenses, which also violates Policy 1.04.
5. Lack of timely follow through of duties that are needed for the proper representation of those units assigned to you; i.e., missing an additional timeline for an arbitration for Park Rapids Schools that again puts Council 65 in a liability position.
6. Progressive Discipline. You have been previously disciplined for these same issues. On July 28, 2004 you received a written reprimand for unauthorized use of the Council 65 corporate credit card. On January 24, 2005, you received a three (3) day suspension for (1) failure to comply with a directive to produce a fitness for work report from a physician in a timely manner; (2) failure to comply to a directive to follow through with computer rebate; (3) lack of communication between yourself and the

bargaining units you represent; and (4) lack of timely follow through of duties that are needed for the proper representation of those units assigned to you, which included missing three (3) discharge arbitration timelines which put Council 65 in a liability position.

The Employer submits that the facts in this case support the Grievant's termination; the Union submits that they do not.

THE EMPLOYER'S EVIDENCE

NOTE: The following testimony by Steve Preble represents a combination of testimony from the first suspension hearing and the subsequent discharge hearing.

STEVE PREBLE

Steve Preble, Executive Director of Council 65, testified that he began his employment with the Council fifteen years ago, and that he has been the Executive Director for the past two and one-half years. He worked as a Staff Representative for the first eleven years of his employment with the Council and Assistant Director for two additional years. Prior to his employment with the Council, he worked for Itasca County Road and Bridge. The Grievant also worked for Itasca County Road and Bridge, and Mr. Preble knew the Grievant, primarily through joint activities as volunteers within their local union. He characterized their relationship as being friendly for many years.

Preble described the primary job duties of a Staff Representative: 1) contract negotiations for the representative's assigned locals; 2) handling grievances for the members within the various locals; and 3) generally dealing with on-going work and labor/management issues.

He testified that he, as then Assistant Director, was on the hiring panel that selected the Grievant as a Staff Representative in 2001. Other members of the panel included the then Executive Director, Gary Johnson, and the President of the Council, Bill Marchand. He stated that there were several candidates for the position, and that he was in favor of hiring the Grievant. He stated that he knew all of the other applicants. He testified that some of the candidates, including the Grievant, were his friends.

Preble said that the Grievant had been President of Local 1452 for several terms and that he'd worked on "lost-time" as a Staff Representative a couple of times prior to being hired permanently.

He testified that the Grievant, following his selection for a permanent position within the Council, was assigned to the Little Falls, Minnesota area, and that the Grievant moved from his home in Grand Rapids to Little Falls.

Preble then testified that a Licensed Practical Nurse unit was merged into the Council on April 1, 2001, and that Bill Marchand, President of Council 65, wrote a letter (with the approval of the Executive Board) which stated that any employee on probation as of April 1, 2001, would no longer be on probation (i.e. they would become permanent staff). As a result of this, one Staff Representative who previously worked with the nursing group, Kathy Kapla, was made a non-probationary permanent Staff Representative with a seniority date of April 1, 2001. Preble went on to state that the Grievant was a lost-time Staff Representative on April 1, 2001, and was not subject to President Marchand's executive order. The Grievant, however, was not in agreement with this interpretation and filed a grievance. The grievance was denied up to the Executive Board level.

On March 5, 2003, seniority became the determining factor when then Executive Director, Gary Johnson, sent the Grievant a letter (Union Exhibit 1):

RE: Elimination of Organizer Position and Bumping Rights

This is to notify you that you have been "bumped" from your current assignment by Kathy Kapla. I am hereby requesting that you notify me as to whose current position you wish to bump into. Please let me know, in writing, by Thursday, March 6, 2003. As of this point in time the positions in which you can bump are as follows:

1. NW Corner
2. Cheryl Jones' Position

For your information, all bumping shall be done in the order of seniority. The process will continue for other affected employees until completed. As usual, employees will have ninety days in which to relocate. However, since I am still in the process of re-evaluating all staff assignments, all staff will remain with their current assignments until further notice. If there are any major changes in assignments, as a result of my re-evaluation, affected positions will be treated as new positions (vacancies) and posted as per the collective bargaining agreement.

This letter, however, was never acted upon. Instead, the Council and the Union entered into negotiations that resulted in a Memorandum of Understanding (MOU) dated May 2, 2003 (Employer Exhibit 115):

NOTE: bold lettering was included in the original document and is not arbitral emphasis.

In light of the mitigating circumstances that currently prevail within and around Council 65, i.e. (possible merger of councils; loss of membership due to governor's budget; abolishment of organizing grant; forced relocation difficulties and hardships; pending grievances; residency requirement inconsistencies) the parties, i.e., MIFSCA and Council 65 AFSCME, will agree to suspend the terms and conditions of the MIFSCA/Council 65 labor agreement, **(related to bumping and posting procedures)** as well as withdraw all formal grievances currently pending, in an attempt to work through a cooperative and consensus arrangement for servicing the locals of Council 65. To achieve this goal, the parties will agree to the following steps and under your [Steve Preble, now the Executive Director] direction will initiate the necessary meetings to accomplish the needed staffing assignments.

1. While the abolishment of the two organizing positions did occur, the parties will agree to forgo the formal process of **bumping** by any staff. This will avoid the total disruption of service to locals and effect a complete reassignment of staff in the effected areas, and it will also preclude anyone from having to re-locate!
2. The parties will operate under the premise that Dean Tharp and Jerry Schaefer will be considered staff without a current staff assignment and they along with neighboring staff and administration will meet and develop logical, reasonable assignments for all those involved to accomplish the goal of covering all of the locals in Council 65. This may involve the inconvenience of all, (i.e. additional travel time, etc.); or some of those affected staff, but eliminates the forced movement of all, or some of those affected staff. (A staff meeting may be called to address this issue).
3. The development of assignments will be done on a consensus basis, if and when possible, with the administration holding the ultimate right to assign, **if** the team decision method does not prevail in distributing all the locals in the effected area. There will **not** be a "seniority" preference in this process, but preference to remain with some of those groups, and if administration has a record of staff having a past history of problems with a group, that may be factored into the decision making process.
4. *NOTE: Item 4. relates to a possible merger that did not occur. I have not included it in this excerpt.*

5. If anyone at this time has an inclination to relocate to NW MN., possible consideration for that move may be discussed. If any new positions emerge in the immediate future, they will be developed and posted with a residency requirement included in the geographical area. If anyone were to resign from the council, the same would happen and this could slightly affect neighboring staff as that vacancy would also be developed and posted with a geographical region and residency requirement.
6. Included in this memorandum of understanding will be a final, approved seniority list. Each employee should check the date for accuracy and once this MOU is signed off by the parties, the list shall become the official seniority list for all MIFSCA members.
7. This memorandum of understanding shall be non-precedent setting between the parties, and in no way shall restrict or limit the rights of management to assign, develop positions, or abolish positions as necessary.
8. If the parties, MIFSCA and AFSCME Council 65, are unable to agree on an assignment arrangement as described above, then everything will revert back to square one and contractual language on bumping and relocation will occur, as determined by seniority.

This document was signed by the Council 65 Executive Director, Steve Preble, on May 14, 2003, and by the MIFSCA President, James Moore, on May 16, 2003.

Preble continued his testimony: On May 22, 2003, a staff meeting was held in Little Falls. This meeting occurred shortly after the Grievant's gastric by-pass surgery. The choice of Little Falls as a meeting site was an effort to accommodate the Grievant's medical condition. Three options were offered to the Grievant at that meeting: 1) Stay in Little Falls, but drive more due to additional units; 2) Take The Northwest Minnesota area and live in the Northwest area; or 3) Move back to Grand Rapids and take care of the Northwest area from there. Despite the significantly increased travel required, the Grievant chose the third option. Mr. Preble described the area as "the longest driving area of all the assignments." This, in part, was due to the Grievant's choice to live on the edge, rather than the center of the area. He testified that some Council 65 Field Staff work out of the central office for the Council in Nashwauk, Minnesota, which is twenty-two miles north of Grand Rapids. He stated that the Grievant chose to work out of his home near Grand Rapids.

Preble further testified that, due to his medical condition and the additional work that would be required during the transition from Little Falls to the northwest territory, he offered the Grievant the help of a "lost-time" employee (Tim Hoshal). He stated that he told the Grievant to take his time in returning because Hoshal was available for an additional two months. He indicated that the Grievant returned to work on that day or shortly thereafter. In addition, the Grievant assured Preble that his work in Little Falls was up-to-date.

Employer Exhibit 24 was introduced. This was actually a series of eight documents related to the Grievant's on-going concerns about his seniority. The immediate issue related to the order in which staff members are selected to attend international conventions. Despite Kathy Kapla being less senior than his adjusted seniority of March 26, 2001 (adjusted for previous "lost-time" work), he was lower on this list. He chose to use his original grievance regarding seniority as the vehicle for correcting this matter.

There were several back and forth correspondences -- with the final one being a March 31, 2004, letter from Preble to Karen Burthwick, the grievant's union representative.

NOTE: Excerpt from March 31, 2004, letter.

This letter is in response to your March 30, 2004, e-mail to Assistant Director Jones and me. We are not clear about why the grievance would proceed to arbitration. In my recent correspondence with the MIFSCA President James Moore (see attached), he clearly indicates that the current convention rotation list is accurate according to MIFSCA. The creation and maintenance of that list was negotiated between MIFSCA and Council 65. If both parties agree that the list is accurate, I don't understand Mr. Mortenson's claim that it is not.

He then testified that he had concerns about the Grievant returning from his surgery too fast. He expressed those concerns, and the Grievant assured him he was ready to go back to work. He testified that complaints from members and officers of the Council began to surface regarding timelines, missing phone calls and even reports of the Grievant passing out. He said that he once-again asked the Grievant if he needed more time for his recovery, and the response was the same.

Employer Exhibit 5 was introduced. It is the notes that Cheryl Jones took during a July 23, 2004, meeting with the Grievant:

Dave Mortenson Disciplinary Hearing
July 23, 2004
10:00 AM

Present: Dave Mortenson and his MIFSCA representative, Karen Burthwick; Steve Preble, Director AFSCME Council 65; Cheryl Jones, Assistant Director AFSCME Council 65. Also present: John Aultman.

Director Preble brought up the following issues:

1. Expense reports showing credit card use for personal cash at casinos.

Dave's response: I did it, write me up. I apologized to Kathryn, I take full responsibility, it was wrong. Others have done it, too.

Steve: No other instances like this; staff call for authorization or have Kathryn take it out of expense check. Have to protect the audit.

Dave: Stopped by Steve's house a couple of times to discuss. Steve never called me back.

2. Concerned about well-being.
 - A. Food expenses on expense report that leads us to wonder if Dave is eating wrong.
 - B. Should have required a doctor's note that Dave was able to return after stomach bypass surgery – Dave chose to return – have never required anyone to document ability to return; may have to be more careful in future.
 - C. Dave has made threatening statements about other staff and has made statements threatening to kill himself that Steve has heard from others and directly from Dave.

Dave's response: Disputes that Steve is concerned about him. I was required to attend a meeting ten (10) days after surgery. Trying to help Steve. My choice to move up here. The doctor never released me to work. Meeting in Little Falls just across the street – pressured to pick up the slack. In September I was in the Emergency Room, told I had 24 hours to live; too many things to do. Seems like any time I am called in it is a couple days after a discussion about my grievance, including today.

I needed to have surgery; talked to Steve about it. All my locals were lined up. My co-workers never supported me and told lies about me. Ask Ken Leas if all of the southern staff haven't been against me all along.

My life has eroded. I lied to the doctor that things would be less stressful. Last two months it is evident that the grievance would not be resolved.

Family problems – wants Steve to stand up for him as a friend. (**Dave started to cry). I have talked to you about my upcoming schedule and why I need to be certain places. Spending many hours on the road. I have requested voice-activated software for writing letters, etc.

Steve: I also spent a lot of time running and picking up the slack. I appreciate what Dave has done in the past. Dave knows better than to think that this is about getting rid of him to hire Tim [Hoshal] or anyone else. I have never required Dave to do anything I didn't think he could do. It hurts that Dave thinks I have purposefully done **anything** to hurt Dave and his family.

Dave: I had harsh words with Gary; I knew I wouldn't get any support from him. You were my friend and I wanted you to support me.

Steve: There are times when there's a line between being a friend and being a boss.

Cheryl: Discussed perceptions. I remember when we met in Little Falls and I asked you if you were coming back to work too soon and was that a good idea. You told me at the time that you had gone to the meeting because it was just across the street and you were getting antsy. Concerned that now you accuse Steve of pressuring you to return to work when you weren't ready.

John: Asked Steve if he has done everything in his power to protect Dave.

A long discussion about Dave's grievance took place.

Steve: Is this the root of Dave threatening to kill himself? Dave indicates that he is going to "let it go" (grievance) and then makes a threatening statement about the staff, so he hasn't let it go.

Dave: Job consumes my whole life, no free time or fun. Wish I had someone in my life; I know its perception: no choice but to move, but need to get my son through school. Need to make a decision – tired of being "pounded into the dirt" and pitted against my co-workers. Shouldn't bother a normal person, but it bothers me. This job is my life. Going to counseling to resolve issues of family vs. job. Hurts when I read in paper that Zac is doing so well.

Karen: Dave needs some kind of relief:

- A. Situation with Kroeplin @ North Country Health Service.
- B. Work load issues
- C. Overnight when meetings scheduled far away (never a problem with the Council, but Dave doesn't like to do)
- D. Voice activated software
- E. Take vacation when necessary

Steve: We have offered whatever assistance Dave feels is necessary. Many times have assigned another staff in situations where there may be conflict; Dave needs to manage his own schedule and make necessary arrangements. Staff can stay overnight if necessary. All staff are urged to take their vacations.

We still need to discuss the issue of the computer rebate, but not today. Will write letter [written reprimand] about the use of the credit card.

Karen: Will the letter be taken out of his file at some point?

Steve: Probably; will need to discuss with Cheryl. Need to make sure that Dave is okay; he needs to take vacation when necessary; we need to know what we can do and have had this discussion many times.

The concern is what is Dave capable of when he is in this state.

Dave: My being capable of putting a gun to my head and pulling the trigger is PAST. I have to put myself and my family first. I need to resolve things or let go. The situation (grievance) of a year and a half hangs on. I get in zones where I want to "take people apart".

More discussion about the grievance.

Steve: You know that we have tried to get the grievance resolved.....

11:50 AM At this point I asked to be excused as I had to leave for an appointment

Cheryl Jones, Assistant Director

Employer Exhibit 7 was then introduced. Once again, these are Jones' notes from a meeting on December 13, 2004. In attendance at the meeting were the Grievant, Preble and Jones. The Grievant was offered Union representation due to possible discipline, and he declined. Five items were discussed

NOTE: The Arbitrator has paraphrased these items:

1. Computer Rebate: Preble stated that it had been two years since this issue first came up and it's still not resolved. He asked the Grievant to provide him with a letter from the company saying that they had sent the check.
2. Doctor Release: Preble had asked for this in the past, but the Grievant's work schedule had prevented him from getting it. Preble asked that he get one within three weeks.
3. A pen flipping incident that had occurred at a Labor/Management Committee meeting. The Grievant said it did not hit anyone and that it was not done in anger.
4. A member asked what happened to their contract proposals. The Grievant had told her it was on support service staff member's desk. It wasn't and the Grievant said he would follow-up and apologize to the staff member.
5. Three termination grievances that were approved for arbitration from North Country Health Services (NCHS) were found to not

have intent to arbitrate letters in their files. The Grievant said that he had a verbal agreement with the employer representative to go to arbitration, if ongoing discussions did not resolve the issues.

Another meeting with the Grievant occurred on January 21, 2005 (Employer Exhibit 8). The Grievant, Jones, Preble, and the Grievant's Union representative, Burthwick, were present

NOTE: Once again, these are paraphrased notes from that meeting:

An update of the two directives contained in the previous meeting:

1. **Medical Statement.** Dave had submitted a very brief statement on an Rx form. The Grievant said that the doctor wanted to know what kind of statement he wanted.

Steve told the Grievant to "send the job description and ask for a statement that he can perform the duties of the job". Steve said that this was needed for the protection of the Grievant and the Council.

2. **Computer Rebate.** The Grievant now stated that there were no rebates for this purchase; they had ended the date of his purchase, and there were no records of a pending rebate or a check. The Grievant "[o]ffered to just pay the money".

They then discussed NCHS and the three grievances that did not have filings for arbitration. The Grievant indicated that there was a settlement offer, and that it indicated the intentions of the parties.

Preble also brought up the issue of the negotiating proposals. He stated that he had received a letter twenty days following the December 13, 2004, meeting that the local had still not heard from the Grievant. Additional complaints were mentioned, and Preble stated that there were too many complaints from too many different places.

The Grievant revisited the rebate issue again, and asked Preble if he wanted him to pay. Preble said he just wanted the truth.

Preble then directed the Grievant to do two things:

1. Get us the statement from the doctor within ten (10) days.

2. Provide documentation from the computer company that the rebate was never paid and is not pending.

Preble said that the meeting was over.

The notes go on to say that the Grievant “stormed out”. After a few minutes he came back and pointed his finger at Jones, made an accusation, and “stormed out” again.

Preble then identified several documents (Employer Exhibits 32 through 49 (except #45)). These documents all spoke to the Grievant’s inability to maintain communications with individual members, locals and other staff. They spanned the time between August 27, 2003, and January of 2005. According to Preble, he talked to the Grievant about all of these concerns, and tried to coach and/or counsel him.

In addition, Preble testified that there were three grievances the Grievant mishandled that were very problematic for the Council. These were the same grievances mentioned in item 5 of Employer Exhibit 7. He testified that an attorney, representing the North Country Health Services (NCHS), had sent a letter to the Council’s attorney, Teresa Joppa, on December 20, 2004. This document was offered into evidence as Employer Exhibit 30.

NOTE: Excerpts from Employer Exhibit 30:

This confirms our recent telephone conversation in which I informed you that the above-referenced grievances are procedurally non-arbitrable.

. . . The Union [Council 65] failed to make any written demand for arbitration within the time limits set forth in the collective bargaining agreement. . . .

Accordingly, the Employer asserts that these three cases are non-arbitrable.

Preble went on to testify that the Council’s staff attorney, Joppa, had to work around the Grievant’s failure to file an intent to arbitrate in very difficult negotiations that did result in settlements.

He testified that other Staff Representatives had missed timelines, but none as serious as the Grievant’s. He also stated that timeliness issues are raised more often now due to more attorneys being involved.

Preble testified that he had “nothing to gain” by causing the Grievant problems, and that he told the Grievant that “we want you to succeed”. He stated that it is difficult for a Staff Representative to have an assignment changed and that the Grievant compounded the problem by choosing to live on the edge of his territory.

Employer Exhibit 72 was entered into evidence. This document, dated May 12, 2005, placed the Grievant on administrative leave following his arrest for possession of methamphetamine. Preble stated that he had no knowledge of the Grievant’s methamphetamine problems prior to his arrest. He testified that the Grievant told him that he had been using it for eighteen months and that ‘he needed meth to do his job.’

Preble was asked if the Employer had considered terminating the Grievant prior to the methamphetamine issue. He stated that they were considering termination of the Grievant for unrelated issues: credit card use, gas expenses, communication problems, failure to provide medical information, timelines, and the computer rebate issue.

Preble testified that the Grievant’s methamphetamine use compromised an organizational effort that the Council was involved in. He said that some people wouldn’t even talk to them after the incident. He also felt that the Council’s professional reputation was damaged.

He then went on to testify that the Grievant was also in violation of the Council’s Policy Handbook section 1.04, Business Ethics and Conduct (Joint Exhibit 2). He referred to several pertinent sentences. The Arbitrator believes that the essence of the document is summarized in the following quote:

Our reputation for integrity and excellence requires careful observance of the spirit and letter of all applicable laws and regulations, as well as a scrupulous regard for the highest standards of conduct and personal integrity.

Preble testified that the Grievant had used the Employer’s credit card inappropriately. He cited Employer Exhibit 18, an August 19, 2004, Council 65 VISA account statement. He pointed out that the Grievant had used the Council’s credit card when he was on vacation for personal expenses. These personal expenses totaled \$197.96. He testified that this was also in violation of the Council’s Policy Handbook (Joint Exhibit 2).

Preble testified that the Grievant missed another timeline on a Grievance filed against the Park Rapids School District. Several documents were introduced (Employer Exhibits 85, 86, 87, 89 and 90) to show that the Grievant knew that the school board turned down the grievance and that the Grievant failed to file for arbitration.

Preble testified that while the Grievant's work load was heavy, it was no more than some of the other Staff Representatives. Employer Exhibits 61, 62, and 95 were staff assignment lists from August 10, August 25 and December of 2004 respectively. These documents indicated that two or three other Staff Representatives had assignments comparable to Grievant's.

Preble identified Employer Exhibit 106 as an Itasca County District Court Criminal Complaint/Document.

NOTE: Excerpts from Employer Exhibit 106:

Count	: 1
Charge	: Controlled Substance Crime in the Second Degree, felony
In Violation of	: 152.022 Subd. 2(1) & Subd. 3(a)
Maximum Penalty	: 25 years and/or \$500,000

On or about May 7, 2005, in the County of Itasca, State of Minnesota, David Lorn Mortenson [the Grievant] unlawfully possessed one or more mixtures of a total weight of six grams or more containing cocaine, heroin, or methamphetamine.

Finally, Preble stated that the Arbitrator should not place the Grievant back into a Staff Representative position. He felt there would be significant concerns about trust, and that the Council represented police and school units that would be especially sensitive to the Grievant's problem with methamphetamine.

CHERYL JONES

Cheryl Jones was sworn in as the Employer's next witness. She testified that she has been the Assistant Director of the Council since April of 2004, and that she was a Staff Representative for the Council for sixteen years prior to that.

She stated that she had no knowledge of the Grievant's drug usage prior to his arrest. Following the arrest, she said that the Grievant told her that he had been using methamphetamine for eighteen months, and that he "used it to help complete his duties". She further testified that the "entire area became aware of his [the Grievant's] arrest". She agreed with Preble that the Grievant's behavior violated the Council's policies.

She testified that the Council 65 Executive Board, at a meeting on January 14, 2005, requested information regarding auto expenses (Employer Exhibit 91) and that the Board reaffirmed their desire to monitor expenses at their April 11, 2005, meeting (Employer Exhibit 92): Bill Marchand, Council President, ". . . suggested

sending to MIFSCA [Union] members a letter requesting their attention to be in compliance with contract language on this issue, and Director Preble to monitor results.”

Jones identified Employer Exhibit 93 as a spread sheet she authored to reflect the Grievant’s auto expenses from October 24, 2004, through April 30, 2005. She testified that the spreadsheet and the attached expense sheets reflect a pattern of overcharging the Council for auto expenses. She said that all of the Council’s employees’ auto expenses were reviewed, and that the Grievant’s showed the most egregious misuse of expenses.

She then testified about submission of timesheets. She stated that the Grievant 1) knew that expense reports are due within three weeks of the final date on the report; 2) he was warned about getting them in late, 3) he was disciplined for the same, and 4) he still continued to get them in late.

She then offered very similar testimony to Preble’s regarding the Grievant’s problems with communication, punctuality, follow-up, and timelines. She stated that she also counseled the Grievant regarding these issues.

She testified that she personally asked the Grievant if he needed more time off at the Little Falls meeting following his surgery, and again later. She went on to state that the Grievant never asked for a reduction in work load and that the Council, to her knowledge, had never turned down a request for time off.

BILL MARCHAND

Bill Marchand, Council 65 President, was sworn in and he testified that he has been the President since October of 2000, and a member of the Council since 1974. Marchand stated that he was present during some of the discussions with the Grievant regarding his work performance, and that it was his impression that the Grievant had “very little ownership” of his problems, and that “it was always someone else’s problem”.

He also testified that the Council had suggested that the Grievant get in contact with an employee assistance program prior to his arrest and that the Grievant rejected the suggestion. In addition, he felt that the request for a medical statement from the Grievant’s physician was also meant to be a fitness for duty request.

THERESA JOPPA

Theresa Joppa, the Staff Attorney for Council 65 testified by phone. She stated that the timelines on the three discharge grievances out of NCHS “were blown by

a long-shot.” She said that she became aware of this when she had a conversation with NCHS’s attorney. She further testified that she had worked out satisfactory agreements on all three cases.

When questioned about vehicle expenses, Joppa stated that she had also, on occasion, filled her car with gas at the end of one week and the beginning of another.

JOE MISKOVICH

Joe Miskovich, Tim Hoshal’s regular work supervisor, testified that he had been contacted by Council 65 in May of 2005 regarding an extension of Hoshal’s leave to the Council. He said that he would have recommended the leave extension to his boss, and that he couldn’t remember a leave request ever being turned down.

ADDITIONAL EMPLOYER EVIDENCE

In addition to testimony, Katherine L. Miller, an associate of the Employer’s advocate, Gregg M. Corwin, sent a letter to the Arbitrator, dated January 27, 2006. A copy of this letter, and its attachments, were also sent to the Union’s advocate, Don Bye. I have identified this document as Employer Exhibit 116.

NOTE: Excerpts from Employer Exhibit 116:

In his testimony during the arbitration sessions held January 23 to January 25, Dave Mortenson admitted to pleading guilty to possession of methamphetamine, which is a controlled substance crime in the second degree and a felony. Accordingly, Section 504(a) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C.A. § 504, prohibits Council 65 from reinstating Mr. Mortenson. That section reads in relevant part,

No person who is or has been . . . convicted of, or served any part of a prison term resulting from his conviction of . . . violation of narcotics laws . . . shall serve or be permitted to serve -

* * *

(2) as [a] . . . business agent . . . or representative in any capacity of any labor organization,

* * *

during or for the period of thirteen years after such conviction or after the end of such imprisonment, whichever is later[.]

* * *

Section 504(a) goes on to state that, “[n]o person shall knowingly hire, retain employ, or otherwise place any other person to serve in any capacity in violation of this subsection.” The penalty for willfully violating this directive is severe. “any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.” *Id.* at § 504(b).

The case of *Beardsley v. U.S. Dept. of Labor*, is instructive regarding the interpretation of Section 504(a). . . . Beardsley sought to become a business agent for a local union after pleading guilty to possession of cocaine – misdemeanor – and being sentenced to “probation without verdict.” He argued that he had not been “convicted” under the meaning of the LMRDA. In the alternative, he argued he was qualified for an exemption from Section 505(a) because he was rehabilitated. To this end, Beardsley offered testimony from two coworkers and his out-patient counselor.

The court found against Beardsley on both arguments and determined he was disqualified from serving as a business agent of a labor organization. First, the court concluded Beardsley had been “convicted of – violation of narcotic laws” even though he was sentenced to “probation without Verdict” because he pleaded guilty to committing the crime. Second, the court denied Beardsley’s request for an exemption because there was not a “clear demonstration” that Beardsley was sufficiently rehabilitated.

Ms. Miller sent the Arbitrator another letter, dated March 20, 2006, that was in response to a letter the Arbitrator received from the Union’s advocate, Don Bye, dated March 10, 2006 (Union Exhibit 97). I have identified Ms. Miller’s March 20, 2006, letter as Employer Exhibit 117.

NOTE: Excerpts from Employer Exhibit 117:

The LMRDA’s prohibitions directly relate to your ruling on this matter. If you reinstate Mr. Mortenson to his position with Council 65, the union will have to violate federal law in order to comply with your award. Nothing stated in Mr. Bye’s letter changes this fact. . . .

Mr. Mortenson’s likelihood of success on the merits of a petition [for an LMRDA prohibition exemption] *is relevant* to your award in this case, however, because it directly bears on Council 65’s ability to *legally* employ Mr. Mortenson.

Mr. Bye cites the case of *Claudio v. U.S. Dept. of Labor* . . . to buttress the argument that Mr. Mortenson will receive an exemption

from Section 504(a), but does not analyze the case. Claudio is factually distinguishable from Mr. Mortenson's case. Claudio pled guilty to a narcotics violation in 1991 and served a thirty day prison sentence. In 1992, he pled guilty to a third degree felony charge of robbery and served eight months of a one year sentence. He was released in April 1993 and began living a productive life. In September 2001, Claudio petitioned the court for an exemption from . . . LMRDA -- over seven years after his release. Claudio had been working as a business agent for a Teamsters local and was discharged when the union learned of Section 504(a)'s employment prohibition.

The court's decision related to the issuance of an injunction. . . . The Court believed Claudio would be successful on that issue and was persuaded by a number of factors that are markedly absent from Mr. Mortenson's case. First, Claudio's petition came over seven years after his release. Second, the union wanted Claudio in the business agent position. Third, Claudio was the only Spanish-speaking business agent in a local representing a large number of Hispanic workers; problems arose after Claudio's discharge; and no one was willing to take over in his position.

By contrast, Mr. Mortenson pled guilty to the charges against him three-and-one-half months ago. He has yet to be sentenced. Council 65 does not want Mr. Mortenson in the staff representative position. The union is not at a critical point in its existence. Mr. Mortenson's discharge did not result in problems for the union or its members and Council 65 was able to find a qualified candidate to take over Mr. Mortenson's position. . . .

Like Beardsley [subject of Employer Exhibit 116], it is too soon to determine if Mr. Mortenson is sufficiently rehabilitated so that he can be trusted to not endanger Council 65's interests. Mr. Mortenson was arrested in May 2005, pled guilty to the charges against him in December 2005 and has yet to be sentenced. It is unlikely Mr. Mortenson will be able to obtain an exemption from Section 504(a) based on these facts and legal precedents. . . .

Mr. Bye's letter also addresses Mr. Mortenson's entitlement to back pay. The assertions on this topic ignore critical aspects of the evidence and testimony presented during the arbitration. Mr. Mortenson's entitlement to back pay does not relate exclusively to the LMRDA. As argued during the arbitration, Council 65 had other independent bases for Mr. Mortenson's discharge that effectively preclude Mr. Mortenson from receiving back pay. Evidence was introduced demonstrating that Mr. Mortenson misappropriated

union funds, missed important arbitration deadlines and had poor follow through with his locals, among other issues. Mr. Mortenson's arrest for possession of methamphetamine, and its impact on the union, formed one of many grounds for his discharge.

Another letter was sent to the Arbitrator by Ms. Miller dated March 28, 2006. This letter merely introduces an accompanying document: Criminal Judgment/Warrant of Commitment regarding the Grievant. The letter and the accompanying letter have been labeled Employer Exhibit 118.

NOTE: Excerpts from the Criminal Judgment/Warrant of Commitment:

Form 49A – Criminal Judgment/Warrant of Commitment [dated 3-20-06]

TERMS AND CONDITIONS OF SENTENCE

Charge Resulting in Plea or Finding of Guilt - 2ND
Degree controlled substance

Minn. Stat. § - 152.022 Subd 2(1) & 3(a)

Count – 1

Level of Offense – felony

FELONY LEVEL SENTENCE

Commitment to the custody of the
Commissioner of Corrections for 48
months . . .

Execution of this sentence is stayed for
10 years

Defendant shall pay a fine of \$1000.00
. . .

PROBATION: The Defendant is placed
on probation.

FINANCIAL CONDITIONS Fine imposed \$1000.00

Surcharge	\$60.00
Law Library	\$5.00
Other: pub. def.	<u>\$28.00</u>
TOTAL	\$1093.00

ADDITIONAL CONDITIONS

330 days in jail as a condition of a stayed sentence

No alcohol/illegal drug use. Enforce with random drug testing.

Complete these evaluations/programs and follow recommendations: Other: Cognitive skills program

Other: usual terms of probation: remain law abiding

Other: no bars: DNA Sample: Continue in AA

Other: not be in pres of anyone using alc/drugs

Other: follow all aftercare conditions

COMMENTS: report to jail 4-4-06 at 7pm; May serve in Labor Union position within 3 years (reduced from mandatory); continue to partake in CHIPS hearing and terms of CHIPS File; Huber granted

A final letter was sent to the Arbitrator from Katherine Miller, dated April 20, 2006. This document is labeled Employer Exhibit 119: "Council 65 is amenable to closing the record in the above captioned-matter."

THE UNION'S EVIDENCE

CONNIE SCHLEE

Ms. Schlee was unable to attend the hearing due to adverse weather conditions. In lieu of her appearance at the hearing, she testified over a speaker phone.

Schlee testified that she has been the president of her union local, 1851 of Council 65, for the past nine years, and that she had observed the Grievant in his performance of duties that related to her local. She stated that the Grievant did very well in negotiations, and that her local sent a letter to the AFSCME

International's President commending the Grievant on his skills in that area (Union Exhibit 28).

She further testified that she was very familiar with the three discharge cases at NCHS. She said that she was satisfied with the work the Grievant did on the three grievances, and she was aware of the on-going negotiations that the Grievant was involved in with NCHS's representative.

Her final testimony was about the Grievant's overall work performance compared to his replacement (following his discharge), Tim Hoshal. She felt that they were both equally capable; however, the Grievant had more experience.

DAVID MORTENSON

The Grievant testified that his family had a history of addictive behavior. He said that his mother and step-father were both alcoholics, and that he, himself, drank excessively up until ten years ago.

He then testified about his previous work and other activities that he had been involved in. He stated that he worked for seventeen and one-half years with Itasca County Road and Bridge, and that he had been active in his union during his tenure. He said that he had been on the Executive Board of the Council for several years, and that he had also served as the President and Vice-president of the Iron Range Trade Assembly, which is the central labor body of the AFL-CIO. In addition he had served as the 8th District COPE Director.

Besides his union work, he had also served on the Greenway School Board from 1993 through 2001, including three years as treasurer and four years as chair.

In regards to his staff time with the Council, he testified that he had served as a "lost-time" Staff Representative from March 28, 2001, through May of 2001, to help the Council out when a regular staff member had passed away. At that time, he worked out of the Council's central office in Nashwauk. He said that there were advantages in working out of the central office in that there was good clerical and phone support. In May of 2001 he was hired on as a probationary Staff Representative and was assigned the Little Falls area.

He further testified that he and his family settled into a trailer home in Little Falls. His family, at that time, included his eighteen year old son and three daughters, aged twenty-one, twenty-four and twenty-six. His Council assignment was to service an area that included Brainerd, Sauk Center, Alexandria, St. Cloud, Kimball, and Little Falls. He testified that he was in that assignment until he was reassigned in 2003. His duties included grievance handling, contract negotiations and attending meetings of and for the Council, union locals and various labor-management committees.

The Grievant then testified about his health at the time of his Little Falls assignment. He weighed around four hundred pounds and decided after many dieting failures that he would look into gastric bypass surgery. He consulted with a doctor and he attended pre-surgical support group meetings.

He then testified that on May 6, 2003, he had the surgical procedure, and there were many things that changed for him following that surgery:

- He had to wear a feed-bag outside of his body for the first four to five weeks.
- His diet was changed to small portions of Ensure, and other soft foods. And, he had to eat more often.
- He had mood fluctuations, both up and down.
- He discovered that he had sleep apnea and, following attendance at a sleep clinic, he had to sleep with a breathing machine.
- He had to be in contact with the hospital on a regular basis for blood drawings and other tests.

He testified that he worked long and hard prior to his surgery to make sure that all of his contract negotiations were up to date. He said that he had turned down an opportunity to go to a Harvard University labor course, in his effort to have everything current prior to his surgery. He stated that Gary Johnson, the then Executive Director of the Council, congratulated him on his work.

He then testified that right before going into surgery there was a change in leadership at the Council. Preble was made Executive Director and Jones was made Assistant Director.

He then testified that he attended the May 22, 2003, meeting in Little Falls, despite his recent surgery. At that meeting, he believed that he would not be able to select an option that would in any way resemble his Little Falls assignment, and he didn't feel that he would have the support of his own union (MIFSCA) in any attempt to stay with his current assignment. He said that to settle everything, he indicated that he would take the northwest assignment under one condition: that he be allowed to live in Greenway. He stated that his son was familiar with the Greenway school and that it would be less disruptive for him to attend Greenway, rather than some other unknown school.

He then referred to two timesheets that the Employer had introduced into evidence: Employer Exhibits 110 and 111. He testified that the inconsistencies in

these documents reflected end of year bookkeeping requirements and had nothing at all to do with him trying to be paid extra for expenses. He said that there were no complaints from the bookkeeper and that he was only paid what he was due. These timesheets also indicated that the Grievant had filled his vehicle with gas twice in the same week. The Grievant testified that his primary vehicle had broken down and that he had also filled his second vehicle. He assumed that he had used the gas for the Employer's work. An additional inconsistency on the timesheets was addressed: On Employer Exhibit 110 he had claimed mileage for a meeting that he did not attend. He testified that he had projected this meeting on his timesheet prior to the date of attendance, and that a car problem prevented him from attending the meeting. Employer Exhibit 111, however, corrected this and the bookkeeper had no problem with it. The final issue on Employer Exhibit 111 was the over payment of a per diem amount totaling \$115.00. The Grievant testified that this was not his mistake and that the amount was correctly deducted from a future check.

The Grievant testified that although the Employer was now bringing these issues up, it had not brought them up during the January 21, 2005, disciplinary meeting mentioned above.

The Grievant then testified about his move to the Grand Rapids area. He said that he bought property, cleared that property himself (requiring a "huge amount of hours" operating equipment), and moved his house trailer. He stated that he had other issues to contend with at this same time: his daughter attempted suicide in July of 2003, and he was involved in the planning for his youngest daughter's wedding.

He then testified that his new work assignment was unbelievable, and that prior to moving to the Grand Rapids area he was already receiving calls from the newly assigned locals and members. In addition to his responsibilities in his new area, he continued to receive calls from members and locals in his previous Little Falls' assignment. He stated that June and July of 2003 "were pure chaos." He testified that the Employer did not offer him additional help and that it was his understanding that the Council was in financial difficulties and that Tim Hoschal would be going back to his regular employment. He testified that Hoschal was around for about a month following the Grievant's reassignment and that Hoschal introduced him to officers and members and showed him both worksites and the meeting places of Council locals.

The Grievant then expanded on his daughter's suicide attempt. He said that it happened around July 1, of 2003, and that he received a call from the Morrison County Sheriff at approximately 11:30 PM on a Saturday night. At that time the Grievant was up north in Swan River. He testified that he was extremely tired and that a friend gave him some methamphetamine and told him that this will keep you awake. He arrived at his home, and found the bloody foot prints of his grandchildren (ages one and three) on the floors.

He then testified that he tried to get some time off, but he heard it in Preble's voice that the Council needed him and that it was not a good time to be off the job. He said that he found it very difficult to say no to anyone, and that he didn't push the issue for time off.

The Grievant testified about his previous addiction problems. He said that he had had problems with alcohol and pot, and that in 1988 he attended treatment for the same. He said that between 1995 and 2001 he had undergone drug screenings for his Itasca County employment and that all the tests were okay.

He described how he felt when he used methamphetamine. He could be alert for twelve hours at a time, and he was able to stay awake for days. He said that it was like taking no-doze, but one hundred times stronger. He felt that he was operating at a peak level. And, in addition, he said it took care of any pains that he otherwise had.

He said that between July of 2003 and the time that he was arrested (May 8, 2005) he continued to use methamphetamine more and more, and that his life became two-fold: work and methamphetamine. He testified that his involvement with methamphetamine was limited to buying it and using it, and that he had never sold methamphetamine, nor had he possessed methamphetamine beyond what he personally intended to use.

He then testified that he was relieved when he was arrested and that he entered treatment as soon as he possibly could. He was arrested on May 8th and entered treatment on May 11th of 2005. His treatment experience was very positive and he got involved with both Alcoholics and Narcotics Anonymous. In addition, he has become active in the community of recovery, including: speaking engagements, an "open mic" radio program, sober parties, statewide seminars, a methamphetamine hotline, and more.

He testified about his current health status. He said he was in excellent health: no drug usage of any kind for nine months, energy is back, and he has maintained a two hundred pound weight loss.

The Grievant then testified about Union Exhibit 11. It was identified as a Cheryl Jones compilation of complaints regarding the Grievant from August 27, 2003, through May 24, 2005. The Grievant testified about all of the complaints. In several instances he testified that the Employer had not let him know that there were complaints. In several others he cited his personal health problems. In a few he cited family problems. For many others he flatly disagreed with the information that Jones had prepared. He said that in every instance of not showing up or being late he, if able, attempted to inform other participants. Although the Arbitrator has not included the details of every complaint and

response, be assured that he reviewed them all. In addition, many of these issues are mentioned individually in other sections of the award.

The Grievant introduced Union Exhibit 13 into evidence. This was a series of documents related to his chemical dependency treatment: 1) initial assessment, 2) progress report, and 3) three weekly journals. All of these documents indicate that the Grievant had significant issues to deal with in treatment and that he worked hard to resolve them. He also testified that he was very active in after-care.

The Grievant then testified about the computer rebate issue. He stated that he bought the computer at Best Buy and that he was aware of the \$1,000.00 ceiling that Council 65 would pay. He purchased a computer that cost in excess of \$1,300.00, but with the rebate it would come in under the ceiling. He gave the rebate information to the Council's bookkeeper, and the bookkeeper mailed it back to him. She felt it was his job to deal with the rebate. He then testified that he filled out the rebate information and mailed it in before the rebate offer was over. He said that Gary Johnson was the Executive Director of the Council at that time, and the issue wasn't treated as anything serious. He testified that he never received the rebate check. Later, he testified, the issue became more serious when Preble took over as Executive Director. He stated that he offered to pay the money directly to the Council at a July, 2004, disciplinary meeting.

The Grievant went on to testify about his use of the Council's credit card. He explained that when he used the credit card at a casino he had paid his auto insurance out of his own money and that the Council owed him much more than the amount he charged at the Casino. He then testified about his use of the credit card when he was on vacation. He said that he had called Preble and was given permission to use it.

The Grievant introduced Union Exhibit 14. This Exhibit was actually three documents: 1) A November 12, 1998, letter from John Giorgi (MIFSCA President) to the Council staff announcing that the Grievant had been hired on a lost-time basis; 2) A May 17, 2001, letter to the Grievant from Gary Johnson, offering him full-time employment as a Staff Representative; and 3) A March 26, 2003, letter from Preble (Assistant Director at that time) informing the Grievant that he had "successfully completed [his] two year probationary period . . ." and further stating that the Grievant had "shown without a doubt that [he had] what it takes to be a successful staff representative . . ."

The Grievant was asked questions about Union Exhibit 15 (Same document as Joint Exhibit 3 [Staff Representative position description], but with additional notes on the bottom):

As long as David Mortenson takes his vitamins, calcium and follows recommended eating behaviors and guidelines and participates in

all recommended follow up appointments, he should be able to perform his job requirements. *Signed by:* [not legible] *and dated* 1/25/05

The Grievant testified that Preble gave him a copy of the position description at the January 21, 2005, meeting mentioned above, and that he was directed to send the position description to his doctor and let the doctor determine if he could perform the duties of his job. The notes above represent that response. The Grievant testified that he returned the position description (with note) to Karen Burthwick and that she gave it to Preble within the ten day requirement.

The Grievant introduced Union Exhibit 16, a March 2, 2005, e-mail from a member of local 3262 (Lake Agassiz Regional Library, Moorhead Branch) in which the member thanked the Grievant for being their Staff Representative. He also introduced Union Exhibit 17, and it contained several documents that reflected positively on the Grievant's work:

1. December 28, 2004, memo to Preble from a local representative who worked for the Todd County Public Works Department. In this memo the representative requests that the Grievant be assigned to her department.
2. A note from Local 1851 that followed their 2004 bargaining process, acknowledging the Grievant's "dedication, leadership and representation . . ."
3. A thank you card, with individual thanks, from Local 1851.
4. A January 28, 2005, letter to Preble from Kevin Dotson, President of Local 2768 (Park Rapids), in which the author expresses deep concerns about the removal of the Grievant as his local's Staff Representative. The letter acknowledges that there were problems with the Grievant, due to his medical problems, but that things are much better now.
5. An April 7, 2005, handwritten letter from the President of Local 1851 (see 1 and 2 above) to the Grievant in which she explains why the Grievant was asked to leave the local's meeting on April 6, 2005. The essence of the letter is that the local thinks very highly of the Grievant, and that they would "de-certify" the Council if the Grievant was removed as their Staff Representative.
6. An April 11, 2005, "To Whom it May Concern" memo in which the President of Local 922 describes the events surrounding their November, 2004, Labor-Management meeting. The

memo described an employer who was denying the union representatives the opportunity to express their opinions. Later, in the memo, the local president asks that the memo be placed in the Grievant's personnel file: "We would like a copy of this in Dave's file showing there was no behavior problems on his part."

Union Exhibit 20 was introduced. The Grievant testified that the May 2, 2003, memo to all of his locals and chapters was intended to explain some communication difficulties that he became aware of. He outlined a remedy, and also identified the date of his gastric by-pass surgery (May 5, 2003).

Union Exhibit 21, an April 7, 2004, memo from a local union activist in Nevis, was introduced. This memo mentions that the activist is hard to get hold of and goes on to talk about some contract proposals.

Union Exhibit 22 was introduced as a January 26, 2005, request by the Grievant that his personnel file and time sheet records be released to his Union representative (Burthwick).

Union Exhibit 23 was introduced as a February 25, 2005, memo From the Grievant to Preble. In the memo, the Grievant asks for additional information from his personnel file and for a "tickler file" that he thought the Employer maintained regarding complaints against the Grievant (Union Exhibit 11).

The Grievant testified that he received Union Exhibit 11 (list of complaints) from the Employer on March 8, 2005, and that he put a note on the cover sheet asking why it had taken so long to get it.

Following extensive testimony earlier in the hearing regarding his responses to Jones' listing of complaints (Union Exhibit 11), the Grievant introduced Union Exhibit 25, which was identified as his written responses to all of the complaints. This document was prepared to represent the Grievant's position at an Executive Board meeting on this same subject.

Union Exhibit 26 was introduced by the Grievant. This document, dated March 16, 2005, is a memo to Preble regarding the Council's disciplinary action against the Grievant. It, like Union Exhibit 25, chronicles the Grievant's work, his perceptions about how he was being treated by the Employer, and explanations for all of the issues that the Employer was using as a basis for discipline.

Union Exhibit 28 was introduced by the Grievant. This is an undated letter from the President of Local 1851 to AFSCME's International President (with copies to Preble, Marchand and the Grievant) commending the Grievant on his "outstanding service to the brothers and sisters of . . . Local 1851." The letter, in addition, identifies "a small percentage of the membership with a selfish political

agenda that does not agree.” The Grievant testified that this letter was sent in April of 2005, and that the reference to a small percentage of the membership referred to the NCHS issue mentioned in Employer Exhibit 7.

Union Exhibits 30 and 31 were introduced. These documents were prepared by Jones and related to a May 26, 2005, meeting with the Grievant, Burthwick, Preble, and Jones regarding the Grievant's gas receipts and time sheets beginning November 4, 2004, and ending February 18, of 2005. Union Exhibit 30 represents inconsistencies and inaccuracies that Jones perceives after reviewing the time sheets. Union Exhibit 31 are Jones' notes from the meeting itself. According to Jones' calculations the Grievant averaged 11.4 miles per gallon; 3.6 miles per gallon less than what was allowed under the Union contract. Her notes also indicate that the Grievant had submitted two expense reports for the same time period, and that the reports were inconsistent. The Grievant testified that he submitted a second expense report for the year ending time period. One was done as a projected listing of events that had not yet happened, and the second was an amended report to reflect what had actually occurred. He also testified that all of these expense reports had been approved by Jones. Regarding the 11.4 miles per gallon, the Grievant testified that his vehicles had consistently gotten less than 15 miles per gallon and that this had not been a problem in the past.

Another issue regarding a dropped time line was brought up at the meeting. This was in relation to a grievance filed against the Park Rapids School Board. The Grievant stated that he did not receive an official response from the School Board until May 25, 2005, (while on administrative leave) and that he had given the response to Burthwick to give to the Council.

The Grievant testified that he was never told that he was in danger of being terminated at the May 26, 2005, investigative meeting, and that other than the methamphetamine issue, he had no reason to believe that the Employer was considering termination.

The Grievant identified Union Exhibit 32, a March 27, 2005, letter from the Grievant to Marchand. In this letter the Grievant asks that he receive all information related to his suspension within five days.

The Grievant identified several other Union Exhibits. Many of these represented clinic visits that were consistent with the Grievant's claim that medical problems caused him to miss or be late for several meetings. He also put into evidence a warrant and other court documents related to his arrest, and several documents regarding his treatment progress.

The Grievant then testified about Union Exhibit 10 (Medtox Drug Screenings from the Itasca County Sheriff's Department, dated from May 9, 2005 through January 21, 2006). The Grievant testified that he was tested every three days for that

period of time. He showed negative results on all except one: The initial testing following his arrest occurred on May 9, 2005, and it showed that he tested positive for methamphetamine and amphetamine.

The Grievant testified about the three cases at NCHS, and denied that he had missed timelines. He said that there were delays all through the grievance process, due to information gathering, and that both he and NCHS's representative had an oral agreement to extend timelines in an effort to reach settlements. He testified that Joppa had contacted him about the timelines after her conversation with NCHS's attorney. He stated that he told Joppa to check with Connie Schlee about the oral agreement to extend the timelines.

ROGER SAYEN

Roger Sayen, Clinical Director of Rapids Counseling testified that he has known the Grievant since he entered treatment at his facility in May of 2005. He said that he was the Grievant's primary counselor and that the Grievant attended treatment for six and one-half weeks, four days per week from 9:00 AM through 12:00 noon during Phase I of his treatment, and two hours per week during Phase II. The Grievant completed his treatment on September 26th, 2005. He described the Grievant as being more motivated than most patients; that he was very interested in recovery; and said that the Grievant's prognosis is very good if he abstains from all chemicals. Following his treatment, the Grievant continued to attend several meetings at the clinic. He testified that methamphetamine was a very addictive substance, and that recidivism rates were higher for methamphetamine than many other chemicals. Finally, he testified that in his opinion the Grievant was physically and mentally ready to return to work.

KAREN BURTHWICK

Karen Burthwick, the Grievant's Union representative, was sworn in. She introduced Union Exhibit 64 (February 27, 2003, memo from Preble to the Grievant and Burthwick); Union Exhibit 65 (March 20, 2003, memo from Marchand to the Grievant and Burthwick); and Union Exhibit 66 (March 30, 2004, memo from Burthwick to Preble), and stated that these documents show that the seniority issue was alive in the minds of both the Grievant and his Union representative (Burthwick). She also introduced Union Exhibit 67 (April 22, 2005, letter from Burthwick to Marchand). This document is in response to Employer Exhibit 13 (April 20, 2005, letter from Marchand to the Grievant in which the Executive Board of Council 65 denies the grievance filed in response to the Grievant's discipline, and offers a compromise settlement, including an EAP evaluation).

NOTE: Excerpts from Union Exhibit 67:

This is to advise you that the decision of the AFSCME Minnesota Council #65 Executive Board and the conditions thereof as set forth in your letter of April 20, 2005 [Employer Exhibit 13] are most certainly not acceptable.

It has also come to our attention that you, Mr. Marchand, failed to give the Executive Board members a copy of the letter I, (Karen) made a special effort to provide you . . .

As you know, the letter to which I refer is . . . hand written and submitted to Mr. Mortenson by Connie Schlee, President of the North County Hospital in Bemidji, MN. . . . Ms. Schlee's letter clearly indicates a preference to retain Mr. Mortenson as their Staff Representative.

Burthwick introduced several other documents, Union Exhibits 71 through 83, which were time sheets and expense reports of other Council staff members. She testified that these documents show that other staff members were remiss in the following areas: late time sheets, less than fifteen miles per gallon expense submissions, inaccuracies in reporting time and place, and overpayments that had to be corrected on subsequent expense reports.

She introduced Union Exhibit 85 (May 24, 2005, Minnesota School Campaign Report. A summary of various organizing campaigns, their progress and their problems). She testified that the contact never mentioned the Grievant or his methamphetamine use as a problem in organizing any of the units.

She testified about the ten day period in which the Grievant was supposed to provide a medical evaluation of the Staff Representative's position description and his ability to perform the duties. She said that he did comply within the ten day period, and that the Employer disciplined him before the ten days had elapsed.

She then testified regarding her personal opinions regarding how the Employer treated the Grievant. She felt that other staff members, who had problems with alcohol, were offered treatment, and in one case, a reduced workload as an accommodation. She said that the Grievant was being held to a higher standard regarding time sheets and expenses than other staff members, and that the Employer was aware of problems with other staff. She went on to state that the northwest territory had been split into two different areas during most of her tenure.

She then testified about the Grievant's work performance since he had been hired. She said that the Grievant "seemed to have little problems ... [and] that

his attitude and demeanor was such that he was heart and soul a union person.” She saw him as being polite, caring, and professional with members and staff. She testified that the Grievant’s seniority grievance and his surgery marked the point that he began to deteriorate. She said that he was “stressed over how he was being treated.”

She testified about her role as the Grievant’s Union Representative. She said it was difficult to get information from the Employer about their concerns with the Grievant. This included expense and time-sheet reports for the Grievant and other Staff members, the Grievant’s personnel file, and the nature of complaints from Council officers and members.

As an employee of the Council, she testified that she had missed timelines and had not been disciplined. She further testified that she had also made oral agreements with employer representatives to suspend grievance timelines.

JOHN AULTMAN

John Aultman, Council 65 Executive Board member, testified that he has been president of his local for ten years and on the Executive Board for eight years. He stated that he helped the Grievant make arrangements for treatment following his arrest. He further stated that he had talked to Preble on May 9, 2005, and informed him that the Grievant would be starting his treatment on the eleventh or twelfth. He testified that he had concerns about the grievant prior to his arrest, and that he and Preble had discussed the situation.

He then testified about his knowledge of the rebate issue. He said that he called the manufacturer about the rebate because Preble wouldn’t. He said that the representative told him that they had no record of issuing a rebate check to the Grievant.

He went on to testify that the Executive Board was fully involved with the suspension of the Grievant in the Spring of 2005, and that there had been no talk of terminating the Grievant. In addition, he stated that the Executive Board had directed Council 65 management to offer mediation. He said that although the Board had not been consulted before or immediately after the termination, it did later support Preble’s decision.

ADDITIONAL UNION EVIDENCE

In addition to testimony, the Grievant’s advocate, Don Bye, sent two documents to the Arbitrator on March 3, 2006, with copies to the Employer’s advocate. I have identified these documents as Union Exhibit 91 (March 10, 2004 memo from the Grievant to Marchand), and Union Exhibit 92 (March 31, 2004, memo

from Preble to Burthwick). Both of these documents were introduced earlier as two parts of a series of documents regarding the Grievant's seniority grievance (Employer Exhibit 24).

On March 10, 2006, Don Bye sent a letter and supportive documentation to the Arbitrator, with copies to the Employer's advocate. I have identified these documents as Union Exhibit 93.

NOTE: Excerpts from that letter.

This [letter] is in response to the employer contention that Section 504 of 29 U.S.C.A. erases or impedes arbitration in this matter. The answer is that it does not. . . .

What we have here is one individual, who has struggled with addiction, who shows excellent prognosis for rehabilitation, and is readying himself for return to fulfillment of one localized representative position. . . .

Certainly, the statute provides that where fact situations warrant, the initial prohibition can be reduced to as little as three years, not the thirteen years that the Employer presumptuously assumes.

Further, there is no limitation in the statute on what constitutes an appropriate date for presentation and consideration of a petition for exemption. As we read the statute, it can be made at any time. . . .

We attach the Claudio decision as example of what we have found that is favorable to a petitioner in this type of situation. We contend that it is more closely parallel to the true status of where the employee and potential petitioner Dave Mortenson are at in this situation, than the Beardsley case cited by the employer. . . .

Therefore, we expect that the Arbitrator will have in mind, and may even reference in the decision, the existence of Section 504 (a), but we contend that in no way precludes the Arbitrator from making a decision favorable to Dave Mortenson, finding that there was not just cause for terminating him prematurely in early June of 2005, without awaiting conclusion of his treatment and without opportunity for him to shed and go forward from the obvious and serious detrimental effect of amphetamine use upon his life activity.

NOTE: Excerpts from the Claudio case:

In 1991, when he was 23 years old, petitioner Francisco Claudio pled guilty to a misdemeanor charge of possession of narcotics. A

year later, he pled guilty to a felony charge of robbery in the third degree, following an altercation with a neighbor who had been harassing his wife. He served eight months of a one-year prison sentence and was released on April 13, 1993. . . .

Claudio, now petitions this Court for an exemption from the statutory bar so that he may work as a business agent for petitioner-intervenor Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (the "Union"). The Union joins in the petition. . . .

I [the Judge] held an evidentiary hearing on the preliminary injunction motion on March 27, 2001. The president of the Union, Claudio, and his wife testified. For the reasons that follow, the motion for a preliminary injunction is granted. . . .

Claudio appears to have been rehabilitated since he committed the crimes in question. Since his release from prison eight years ago, he has not broken the law. . . . he has a passion for and commitment to his work for the members of the Union. . . . [T]he crimes in question were serious ones, no doubt, but they do not suggest in any way that Claudio is a corrupt or evil person. . . . [T]he Union wishes to employ Claudio as a business agent . . . [and] Claudio can only help the Union, not endanger it.

An additional letter was sent by Bye to the Arbitrator dated March 28, 2006. This letter was in response to Employer Exhibit 117. I have labeled this letter Union Exhibit 94.

NOTE: Excerpts from Union Exhibit 94:

We received and reviewed the response or rebuttal of Attorney Miller [Employer Exhibit 117] last week regarding Section 504(a). In it she still contends that the facts are such that the Arbitrator cannot issue an award of reinstatement. . . .

We have consistently stated that we are seeking award of reinstatement, and . . . stand ready to respond to award of reinstatement that may be limited or conditioned by the statute, the sentencing Court, and Federal Court, whether or not, or however referenced in Arbitration Award.

Therefore we ask that you keep the arbitration record open a few more days to permit us to secure and submit the actual transcript of the sentencing Court.

On April 24, 2006, the Arbitrator received a transcript of the March 20, 2006, sentencing hearing related to the Grievant's drug arrest. The Arbitrator has labeled this document Union Exhibit 95. Several community people testified on behalf of the Grievant in an attempt to limit the amount of actual jail time. The Judge ruled that the plea agreement should be upheld and that the Grievant should do eleven months in jail, ten years on probation and pay a fine of \$1,077.00. In addition, the Judge stated:

. . . I have the authorization to reduce the time period where he would otherwise be ineligible for holding certain positions and so on with a labor union, down to as little as three years, and I do so order.

DISCUSSION AND DECISION

In examining the record of this matter, the Arbitrator read all the exhibits that were either introduced or mailed; and he reviewed all the testimony. In total, there were seven days of testimony and over two hundred exhibits. Due to the fact that the drug issue occurred later than the other five reasons for the Grievant's discharge contained in his discharge letter (Employer Exhibit 74), the Arbitrator will address issues 2 through 6 first.

2. Falsifying statements of expenses which include your time and expense sheet. This also violates Policy 1.04. In addition you have continued to submit late time sheets.

The Employer argues that the Grievant submitted expense reports which were not consistent with activities entered on his time sheets. Cheryl Jones introduced a spread sheet (Employer Exhibit 93), and cited several examples where the times on gas receipts were inconsistent with the Grievant's reports regarding his activities. She also alleged instances where the Grievant had submitted two time sheets for the same period of time, and that these time sheets claimed different miles and indicated different times for meetings. She also testified that, despite warnings and discipline, the Grievant continued to submit late time sheets.

The Grievant argues that the receipt times at gas stations are not reliable, and that they offer little evidence to contradict his time sheets. He also testified about the two time sheets for the same period issue. He said that this happened at the end of each year. The bookkeeper requires time sheets in advance, and Staff Representatives submit time sheets and expense information based on their projected activities. If changes occur, however, a second time sheet is submitted to accurately reflect actual time and expenses. He said that he did not profit from the adjustments.

Karen Burthwick introduced several documents (Union Exhibits 71 through 82) that refuted the Employer's claim that the Grievant's time sheets and expenses were more egregious than his co-workers.

The Arbitrator is not convinced that the Grievant's timesheets were any less authentic than other employees of the Council. As long as the expenses were in line with general policies, the documentation of times and places seemed to be less than critical. The Grievant's explanation for double time sheets seems logical, and the Arbitrator saw nothing to substantiate any possible charge of expense theft.

The Arbitrator, however, does agree with the Employer regarding the lateness of time sheets. The Grievant was warned and put on notice that he had to submit these documents on time. The Employer showed that it had disciplined other Staff Representatives for the same issue. Despite his improvement, the Arbitrator finds that the Grievant should have been more diligent in this area.

3. Unauthorized use of Council 65 credit card for personal gas purchases, in violation of Policy 1.04 and the collective bargaining agreement Article 5, Section I (1).

The Employer alleges that the Grievant charged gas to the Council's credit card that was not used for its business. In addition, time sheets with expense documentation (Employer Exhibit 93) were introduced that showed that the Grievant had filled his gas tank on a Friday and on the following Monday with no miles indicated for business usage. In addition, evidence was provided that some gas purchases during the week indicated that the Grievant had refilled without showing enough business miles to justify the purchase. The Employer also showed that the Grievant's vehicle(s) averaged less than 15 miles per gallon.

The Union offered evidence that the Grievant was not alone in his pattern of purchasing gas. They also offered evidence that the Grievant had changed vehicles during some pay periods, due to the mechanical failure of his primary vehicle. In addition, the Union offered evidence that the Grievant's usage of gas had not changed during his entire tenure with the Council.

The Arbitrator finds, that while the Grievant's gas purchases were slightly higher than some of the Council's guidelines, his purchases did not exceed those of other Staff Representatives who were not disciplined.

4. Unauthorized use of union funds for personal expenses, which also violates Policy 1.04.

The Employer offered evidence (Employer Exhibit 18) that the Grievant had used the Council's credit card for personal expenses. The VISA bill had several

notations for charges in the State of Missouri while the Grievant was on vacation leave. These expenses totaled \$197.96. The Grievant's testimony was that he had received permission from Preble by phone.

It is apparent to the Arbitrator that it was inappropriate for the Grievant to use the credit card to purchase gas while on vacation.

5. Lack of timely follow through of duties that are needed for the proper representation of those units assigned to you; i.e., missing an additional timeline for an arbitration for Park Rapids Schools that again puts Council 65 in a liability position.

The Employer offered several documents to support its position that the Grievant should have known that the grievance at issue had been turned down by the Park Rapids School Board.

The Grievant testified, that although he was aware, informally, that the grievance had been turned down, he did not receive any official notification until he was on administrative leave; and that he then forwarded that notification to the Council. He offered into evidence Union Exhibit 8: a copy of an envelope, dated May 24, 2005, that was mailed to him from Park Rapids Area Schools. The contents of the envelope were forwarded to the Council. Unfortunately the Grievant did not have a copy of the contents.

The evidence shows that the Grievant was aware of the School Board's decision to turn down the grievance at their meeting on April 25, 2005. On April 26, 2005, he was at a local union meeting where the President, Kevin Dotson, presided. A resolution was passed to move the grievance to the next step. The contract between the parties (Union Exhibit 6) spells out the time requirements for grievances.

Section 3. Definitions and Interpretations: Subd. 2. Days: Reference to days regarding time periods in this procedure shall refer to working days. A working day is defined as all days Monday through Friday not designated as holidays by the Agreement.

Section 5. Adjustment of Grievance: Subd. 3. Level III: Within ten days after the meeting, the District shall issue its decision in writing to the parties involved.

Section 10. Arbitration Procedures: Subd. 1. Request: A request to submit a grievance to arbitration must be in writing signed by the aggrieved party, and such request must be filed in the office of the superintendent within ten days following the decision in Level III or upon District review pursuant to Section 6.

The Grievant testified that he had the local move the grievance to the arbitration level in advance of the School Board's anticipated written response because the local would not meet again for a month. The Grievant, however, did not initiate the move to arbitration within the Council's procedures.

Employer Exhibit 89, is a June 14, 2005, letter from Tim Hoshal to Glen Chiodo, Superintendent of the Park Rapids Schools. In this letter Hoshal requests "a reconsideration of the time lines:"

Due to a death in the family of the Union President, the grievance did not get in under the time lines spelled out in the Grievance Procedure of the bargaining agreement. [The letter further states,] When you responded back to the union with your denial, why wasn't the staff representative notified before May 24, 2005, and the union president was?

Chiodo's response letter (Employer Exhibit 90, dated June 22, 2005) denied the request for extending the time lines. In the letter he also responds to the question asked by Hoshal in Employer Exhibit 89:

I am not sure of your meaning when you ask the question of why the Staff Representative wasn't notified before May. . . . If you are referring to Mr. Dotson requesting an extension, the only reason Mr. Dotson was the only one notified of the denial is because he was the individual who notified me that Dave Mortenson was no longer involved.

The Arbitrator is aware that there are both informal and formal responses to grievances. It is not uncommon to wait for the employer's formal response. It appears that there was confusion as to who was responsible for filing for arbitration. Dotson evidently told the superintendent that the Grievant was *out of the loop*. It is also noteworthy to apply the actual timelines to the issue at hand. If the Superintendent had ten work days following the Board meeting to respond to union, that date would be May 9, 2005. And if the union then had ten days to notify the Superintendent of its intent to file for arbitration, that date would be May 23, 2005. The Grievant did not receive the Superintendent's response within that time period. He was on administrative leave effective May 12, 2005, with instructions to "not to do any staff representative duties during this leave and refer any local or employer concerns to the Council office."

The Arbitrator does not find enough evidence regarding this issue to lay the blame for a missed timeline at the feet of the Grievant. While it is true that the Grievant was informally aware of the Board's response, and he even took actions to prepare for the next step (arbitration), it is not unusual for a Staff

Representative to wait for a formal response before actually filing for arbitration. In addition, there is evidence that the grievant was intentionally not notified.

- 6. Progressive Discipline.** You have been previously disciplined for these same issues. On July 28, 2004 you received a written reprimand for unauthorized use of the Council 65 corporate credit card. On January 24, 2005, you received a three (3) day suspension for (1) failure to comply with a directive to produce a fitness for work report from a physician in a timely manner; (2) failure to comply to a directive to follow through with computer rebate; (3) lack of communication between yourself and the bargaining units you represent; and (4) lack of timely follow through of duties that are needed for the proper representation of those units assigned to you, which included missing three (3) discharge arbitration timelines which put Council 65 in a liability position.

NOTE: January 28, 2004, disciplinary letter.

The Arbitrator received notes from a disciplinary meeting that was held on July 23, 2004. In that document (Employer Exhibit 5) there were notes regarding the improper use of the Council's credit card at a casino. For whatever reason, the Arbitrator does not have the actual written reprimand. I'm accepting this as previous discipline over the objection of the Union's counsel. The Grievant did have continuing problems related to his credit card usage, and it is appropriate as an example of previous discipline.

Although the three day suspension mentioned above is not to be included as previous discipline (see Joint Exhibit 7), the items mentioned in the three day suspension can be used as evidence in the matter before the Arbitrator. I will address each item in order:

NOTE: Three day suspension evidence:

1. failure to comply with a directive to produce a fitness for work report from a physician in a timely manner

While there was a great deal of frustration regarding the fitness for work report, the Arbitrator finds that the Grievant did comply with the Employer's final request in a timely manner. Employer Exhibit 8 (Jones' notes during January 21, 2005, meeting with the Grievant, Preble, and Burthwick) state that Preble directed the Grievant to "[g]et us the statement from the doctor within ten (10) days". The Grievant gave proper documentation to the Employer (Union Exhibit 15) within the ten day period of time. There was some discussion at the hearing regarding

the note not being signed by a physician, however, it appeared that both parties made that discovery during the hearing; not at the time of the termination letter.

NOTE: Three day suspension evidence (continued).

2. failure to comply with a directive to follow through with computer rebate

Did the Grievant trick the Employer into thinking that a rebate would be coming, in an effort to have the Employer pay for a more expensive computer? Did the Grievant unknowingly submit a rebate form after the rebate period had expired? The answers to these two questions remained unanswered at the close of the hearing.

John Aultman's testimony clarified one point: the computer company never issued a rebate check related to the purchase of the computer.

Once again, Employer Exhibit 8 is helpful in assessing this issue:

2. Computer Rebate. Dave says the company said there are no rebates for this purchase. Says the rebate ended the date that he bought the computer. No record of a rebate pending or a check issued. Offered to just pay the money.

The Arbitrator is of the opinion that once the Grievant offered to pay the Employer for the amount of the rebate, he could no longer be disciplined for this matter.

NOTE: Three day suspension evidence (continued).

3. Lack of communication between yourself and the bargaining units you represent.

Employer Exhibits 32 through 44, 46 through 49, 68, and 79 through 83 are complaints and/or communications about complaints against the Grievant from August of 2003 through March of 2005. Although the Grievant attempted to explain away many or all of these complaints (see Union Exhibit 25), the fact remains that many complaints were sent to the Council office that related to the Grievant's inability to stay in communication with locals and their members. The Arbitrator is convinced of two things: 1) communications are essential for the job, and 2) the Grievant fell significantly short in this area.

NOTE: Three day suspension evidence (continued).

4. lack of timely follow through of duties that are needed for the proper representation of those units assigned to you, which included missing three (3) discharge arbitration timelines which put Council 65 in a liability position.

Much of this is also covered in 3. above, and the Arbitrator will limit his assessment to the three discharge arbitration timelines. The Employer contends that the Grievant did not notify NCHS about the Council's intent to arbitrate the grievances. The Grievant contends that he had an understanding with Robert Verchota, NCHS's Human Resources Representative, that if negotiations failed to settle the grievances, the Council would be moving to arbitration. In essence, a presumptive notice.

The Employer introduced over twenty exhibits related to this issue. The most significant of these exhibits are Employer Exhibits 63, 64, 65, and 30. Employer Exhibits 63 and 64 are letters dated July 19, 2004, from Robert Verchota to the Grievant "RE: Peggy Kroeplin Grievance" and "RE: Amy Price Grievance" respectively. They both contained the following language:

According to Article 12, Step 3, this letter serves as NCHS's answer to Step 2. Therefore, you have ten (10) calendar days to demand arbitration. NCHS recommends that you request a list of arbitrators from the State of Minnesota as we have not developed any history with arbitrators who I might offer as neutral.

Employer Exhibit 65 is a November 17, 2004, letter from Verchota to the Grievant "RE: Arbitration: Kroeplin, Price, Barge" in which he states:

This is to notify you that North Country Health Services (NCHS) does not believe the above cited grievant's issues are arbitrable based on the collective bargaining agreement time lines as defined in Article 12, Step 3, p. 18.

In July of 2004, NCHS responded to the step two meetings and cited the time line (example attached). NCHS did not hear back from AFSCME since July of 2004 regarding these grievances. The procedural arbitrability of these cases are at issue and you are so advised.

Employer Exhibit 30 is a December 20, 2004, letter from NCHS's attorney, Jan D. Halverson, to the Council's Staff Attorney, Teresa L. Joppa. Mr. Halverson backs up Verchota's theme:

On July 19, 2004, Robert P. Verchota, Vice President Ancillary Services and Human Resources for North Country Regional Hospital issued the Employer's answer to the grievance following the Step 2 meeting as required by the collective bargaining agreement. . . .

The Union failed to make any written demand for arbitration within the time limits set forth in the collective bargaining agreement.

Although the Employer did not contact Connie Schlee as the Grievant had suggested, her testimony did not go beyond: ". . . she was aware of the ongoing negotiations." Verchota's July 19, 2004, letters, not only respond to the Grievant's settlement offers, but they also clearly ended any ongoing negotiations. It is hard to imagine a more forthright warning. The Arbitrator finds that the Grievant missed the timelines for the three grievances and put the Council in an untenable position.

NOTE: Back to reason number one for the discharge contained in Employer Exhibit 74:.

1. You have admitted to possessing an illegal substance, which has negatively affected the reputation of Council 65 and violates AFSCME Council 65 Policy 1.04 (Business Ethics and Conduct)

It is uncontested that the Grievant used and possessed methamphetamine. He pled guilty to a felony level criminal offense, and he is currently serving a one year jail sentence. The Employer argues that this offense ended the trust relationship between the Council and the Grievant. It also argues that the reputation of the Council has been damaged by the Grievant's notoriety, and that continuing to employ him would extend that damage. In addition, the Employer argues that the Grievant's work performance prior to his arrest was such that they were already considering a discharge.

The Union argues that the Grievant was a victim of circumstances and that his usage of methamphetamine was predictable considering the amount of stress in his daily life. They believe that the Grievant has been resurrected as a responsible and healthy person following his treatment for chemical abuse, and that permanently firing the Grievant would not be in the best interest of the Grievant or the Council.

Testimony and written evidence provided in the hearing described the Grievant as two totally different people. An example of the first person is reflected in the May 17, 2001, letter from Gary Johnson to the Grievant (Union Exhibit 19):

It is with great pleasure to offer you the position of Field Service Representative in Central Minnesota.

I am impressed with what I see as your desire and interest to work in the labor movement. Your leadership ability and your enthusiasm and passion for the rights of workers everywhere will serve the membership of this Council well. I firmly believe you will be a real asset to Minnesota Council #65.

Another Example of the first person is contained in Union Exhibit 14, a letter from Steve Preble to the Grievant, dated March 26, 2003, (almost two years later):

This letter is to officially inform you that as of today (March 26, 2003) you have successfully completed your two year probationary period with AFSCME Council 65.

From the start and throughout your probationary period, you have shown without a doubt that you have what it takes to be a successful staff representative. I would like to congratulate you on this accomplishment and wish you a long and successful career with Council 65 and the labor movement.

The second person began to show up for work during the summer of 2003. This person used the Council's credit card for cash at a gambling casino. He threatened others and even suggested that he might kill himself. He had fits of anger and rage. He missed appointments, didn't return phone calls, missed basic time lines in grievance work, and was careless about expenses.

The Grievant's use of methamphetamine marked the end of the first person and the arrival of the second. The Grievant testified that he had more energy and was better able to keep up with his work while on methamphetamine; and yet, complaints, mistakes, and irrational behaviors followed its use. Although it is true that the Grievant had many challenges within his family and on his job, the Arbitrator has little sympathy for any suggestion that these demands became so excessive that the Grievant had to use methamphetamine to re-energize himself. The Arbitrator believes that number one in the discharge letter (methamphetamine possession and usage) is part and parcel of the other five reasons, and that despite the Grievant's immense personal problems, his drug usage was ultimately his undoing.

The Grievant described himself as an "addictive type", and he testified that he had already been through treatment for problems related to alcohol. Why would the Grievant turn to what is known as a much more addictive chemical? The Grievant made a terrible mistake when he chose to use methamphetamine; a mistake that has cost him his freedom and now his job.

The Arbitrator researched many recent arbitration awards before making his decision. In no case could he find an Employer who was required to reinstate an employee who had committed a drug related felony. Much more, it would be unreasonable to expect an Employer to fill a position three years from now with a person who is on probation for a drug felony. The continued enterprise of the Employer would be threatened by that outcome.

The Union cited Claudio as a relevant case to look at before making the Arbitrator's decision. The Arbitrator, finds the facts in Claudio to be much different: 1) the union wanted Claudio to work for them; and 2) Claudio possessed specific skills that the union could not find elsewhere. The Employer, in the matter at hand, does not want to employ the Grievant, and it has already hired another employee who is performing the duties.

The Union also requested back-pay for the Grievant to the time that the Grievant actually made his plea in Court. The Arbitrator views the Court hearing as a separate process from the employment relationship. The Grievant confessed to the Employer his use, possession, and arrest for methamphetamine. The Employer took deliberate and reasonable actions when it first placed the Grievant on an administrative leave, effective May 12, 2005, and subsequently terminated the Grievant on June 3, 2005.

The Arbitrator would be remiss if he didn't comment about what he sees as a third person that Mr. Mortenson is attempting to become. This person is chemically free, and he has been active in his recovery ever since his arrest. He now approaches recovery in the same manner he approached his earlier union activities: with energy and whole heartedness. He not only believes in recovery for himself; he advocates for others in the same process. I wish Mr. Mortenson and his family all the best.

AWARD

The grievance is denied. The Employer had just cause to discharge the Grievant, effective June 3, 2005, and there is no justification for back-pay.

Respectfully submitted this 1st day of May, 2006.

Eugene C. Jensen, Neutral Arbitrator